

**SANITIZED DECISION – DOCKET NO. 05-417 MFE – BY R. MICHAEL REED,
CHIEF ALJ – SUBMITTED for DECISION on NOVEMBER 18, 2005 – ISSUED
on APRIL 13, 2006**

SYNOPSIS

MOTOR FUEL EXCISE TAX -- WEST VIRGINIA OFFICE OF TAX APPEALS LACKS STATUTORY AUTHORITY TO AWARD INCIDENTAL DAMAGES AND REASONABLE ATTORNEY’S FEES AGAINST STATE TAX COMMISSIONER -- The very general language of W. Va. Code § 11-10A-12 [2002] does not confer authority for the West Virginia Office of Tax Appeals, a limited-jurisdiction, executive-branch tribunal, to award incidental damages and reasonable attorney’s fees to a taxpayer who substantially prevails against the West Virginia State Tax Commissioner in litigation before this quasi-judicial administrative agency.

FINAL DECISION

This unusual matter raises a novel and important issue of law raised by a taxpayer in the context of the State Tax Commissioner’s withdrawal of a state tax civil money penalty assessment.

FINDINGS OF FACT

1. On July 06, 2005, a “criminal investigator” with the “Criminal Investigation Division” (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an on-the-highway, visual inspection of a sample of the motor fuel withdrawn (into a vial) then by the investigator from one of the motor vehicles (trucks) owned and operated by the Petitioner. That visual inspection of the fuel sample indicated to the naked eye of the Commissioner’s “criminal investigator” -- who was not trained and certified to operate a commonly used, portable, fuel color analyzer device -- that the fuel had a “purplish,” that is, a dark, slightly red, tint to it. Therefore, on that same date, the criminal investigator with this Division of the Commissioner’s Office issued a motor fuel excise tax civil money penalty assessment

against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code.¹ Written notice of this assessment was hand delivered to the driver of the Petitioner's vehicle in question on the same date.

2. Upon visually inspecting the fuel in this motor vehicle later that same day, the Petitioner's vice-president did not observe any red tint at all, only a black tint.

3. On or about July 13, 2005, to help carry the Petitioner's statutory burden of proving the invalidity of the civil money penalty assessment, one of the Petitioner's employees took this motor vehicle -- with the fuel in it in the identical condition as on the one-week earlier date of the criminal investigator's inspection -- to a certain independent truck repair facility; the latter found no dyed diesel fuel in this motor vehicle, but, instead, did find that the darker-than-normal color to the fuel had been caused by a somewhat faulty fuel injector that had allowed some exhaust "soot" to enter the fuel system.

4. In having the independent truck repair facility determine whether the Petitioner's motor vehicle in question contained dyed diesel fuel on the date in question, the Petitioner incurred incidental costs of \$ that it would not have incurred but for the need to prove the invalidity of the assessment. See Petitioner's Exhibit #1. These costs included, among a couple of other things, the \$ cost of the diagnosis and minor (not then vital) repair work done by the independent truck repair facility; the \$ of wages of the driver to take the truck to the repair facility and the cost per mile of running the truck to

¹The notice of assessment incorrectly cited W. Va. Code § 11-14C-31 as having been violated. That section actually involves claiming refunds of motor fuel excise tax. W. Va. Code § 11-14C-36(a)(3) [2003] is the correct reference for the violation of unlawfully using dyed diesel fuel in a highway vehicle. W. Va. Code § 11-14C-36(b) [2003] provides for the amount of the civil money penalty for such a violation (and certain others). W. Va. Code § 11-14C-33(a) [2003] provides for the general applicability of the West Virginia Tax Procedure and Administration Act (article 10 of chapter 11 of the W. Va. Code) to the West Virginia Motor Fuel[] Excise Tax Act (article 14C of that Code chapter).

that facility; \$ for the lost revenues for one day resulting from not having that truck available for the Petitioner's normal work of servicing portable toilets; and \$ for the Petitioner's officer's time in searching for appropriately skilled laboratories to help determine whether dyed diesel fuel was in the truck.

5. By mail postmarked on or about July 19, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment (without the assistance of legal counsel). *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2002]. With leave of this tribunal, the Petitioner's subsequently retained legal counsel filed an amended petition for reassessment.

6. On or about September 09, 2005, a certain tax and revenue auditor with the Commissioner's Field Auditing Division analyzed the fuel sample in question by operating a certain commonly used, portable, fuel color analyzer device, for which he had been trained and certified to operate. From this analysis he determined that there was a sufficient level of unauthorized, dyed red, diesel fuel in the sample to constitute a violation. At the subsequent evidentiary hearing before this tribunal there was some indication, however, that this particular fuel color analyzer may not have been properly calibrated on September 09, 2005 (although it was shown to be calibrated correctly on a date more than a month later).

7. On September 27, 2005, a prehearing conference was conducted in this matter, at which counsel for both parties appeared before the assigned administrative law judge.

8. Later on the same date of September 27, 2005, the Internal Revenue Service determined from their laboratory results that the fuel sample in question contained **no** dyed diesel fuel.

9. On or about October 06, 2005, the Commissioner filed notice that, in light of the findings of the Internal Revenue Service, he had withdrawn the assessment and moved that this matter be removed from the docket of this tribunal. On that same date, October 06, 2005, the assigned administrative law judge with this tribunal noted that the assessment itself had already been withdrawn but denied the Commissioner's unilateral motion to remove the matter entirely from the docket, on the ground that the issue raised by the Petitioner in its amended petition for recovery of incidental damages and attorney's fees was still pending, and that it was appropriate to hold an evidentiary hearing and receive briefs on that novel issue.

10. On November 08, 2005, this tribunal did hold an evidentiary hearing on the issue of the Petitioner's recovery of incidental damages and attorney's fees from the Commissioner. In addition to their closing oral argument at the aforementioned evidentiary hearing, counsel for both parties submitted post-hearing briefs.² This matter was fully submitted for decision on November 18, 2005.

11. According to an attachment to the Petitioner's final brief in this matter, the Petitioner has incurred \$ of attorney's fees through that date, and the Petitioner seeks to recover from the Commissioner this amount, plus the \$ amount of the incidental damages totaling see Finding of Fact No. 4, above, for a grand total of \$, through the date of that final brief of the Petitioner.

² Sadly, none of the briefs submitted in this matter were appropriately focused in their analysis of the dispositive issue of law. For example, neither party mentioned any authorities (or, if applicable from their research, the dearth of authorities) explaining the reach of language similar to that in the last clause of W. Va. Code § 11-10A-12 [2002] in the context of a limited-jurisdiction, executive-branch tribunal. Another example: neither party mentioned section 7430 of the Internal Revenue Code or any other relevant federal tax provision.

DISCUSSION

The only issue necessary to decide in this matter is the question of law of whether this tribunal has the authority to award a taxpayer incidental damages and reasonable attorney's fees when, as here, the taxpayer substantially prevails against the State Tax Commissioner.

W. Va. Code § 11-10A-12 [2002], entitled, "Powers of the office of tax appeals," provides:

In determining the outcome of a case, the office of tax appeals may affirm, reverse, modify or vacate an assessment of tax; may order the payment of or deny a refund, in whole or part; may authorize or deny a credit, in whole or part; or **may grant other relief necessary or appropriate to dispose of the matter.**

(emphasis by bold print added) Does the language in this statute emphasized in bold print authorize this tribunal to award incidental damages and reasonable attorney's fees against the State Tax Commissioner? Despite the fact that, when read in isolation, this statutory language seems to indicate a broad set of powers, this tribunal, being mindful of other applicable and overriding law, concludes that it does not have such authority.

In contrast to this very general state tax statutory language, the provisions of section 7430 of the Internal Revenue Code, as last amended (first enacted in the year 1982), is much more explicit and detailed about the awarding of costs and certain fees to prevailing taxpayers in certain situations against the Internal Revenue Service in administrative litigation or court proceedings involving federal tax laws.³

³ 26 U.S.C. § 7430, as last amended, provides in its entirety as follows [for easier reading of this necessarily lengthy footnote, this very long quotation is not set forth in even smaller font size and is not "blocked in"]:

7430. Awarding of costs and certain fees.

(a) In general. In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the

prevailing party may be awarded a judgment or a settlement for--

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(b) Limitations.

(1) Requirement that administrative remedies be exhausted. A judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service. Any failure to agree to an extension of the time for the assessment of any tax shall not be taken into account for purposes of determining whether the prevailing party meets the requirements of the preceding sentence.

(2) Only costs allocable to the United States. An award under subsection (a) shall be made only for reasonable litigation and administrative costs which are allocable to the United States and not to any other party.

(3) Costs denied where party prevailing protracts proceedings. No award for reasonable litigation and administrative costs may be made under subsection (a) with respect to any portion of the administrative or court proceeding during which the prevailing party has unreasonably protracted such proceeding.

(4) Period for applying to IRS for administrative costs. An award may be made under subsection (a) by the Internal Revenue Service for reasonable administrative costs only if the prevailing party files an application with the Internal Revenue Service for such costs before the 91st day after the date on which the final decision of the Internal Revenue Service as to the determination of the tax, interest, or penalty is mailed to such party.

(c) Definitions. For purposes of this section--

(1) Reasonable litigation costs. The term "reasonable litigation costs" includes--

(A) reasonable court costs, and

(B) based upon prevailing market rates for the kind or quality of services furnished--

(i) the reasonable expenses of expert witnesses in connection with a court proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States,

(ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and

(iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of \$160 per hour [for the year 2006] unless the court determines that a special factor, such as the limited availability of qualified attorneys for such proceeding, the difficulty of the issues presented in the case, or the local availability of tax expertise, justifies a higher rate.

In the case of any calendar year beginning after 1996, the dollar amount referred to in clause (iii) shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) [26 U.S.C. § 1(f)(3)] for such calendar year, by substituting "calendar year 1995" for "calendar year 1992" in subparagraph (B) thereof. If any dollar amount after being increased under the preceding sentence is not a multiple of \$ 10, such dollar amount shall be rounded to the nearest multiple of \$ 10.

(2) Reasonable administrative costs. The term "reasonable administrative costs" means--

(A) any administrative fees or similar charges imposed by the Internal Revenue Service, and

(B) expenses, costs, and fees described in paragraph (1)(B), except that any determination made by the court under clause (ii) or (iii) thereof shall be made by the Internal Revenue Service in cases where the determination under paragraph (4)(C) of the awarding of reasonable administrative costs is made by the Internal Revenue Service.

Such term shall only include costs incurred on or after whichever of the following is the earliest: (i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals; (ii) the date of the notice of deficiency; or (iii) the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent.

(3) Attorneys' fees.

(A) In general. For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or

not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

(B) Pro bono services. The court may award reasonable attorneys' fees under subsection (a) in excess of the attorneys' fees paid or incurred if such fees are less than the reasonable attorneys' fees because an individual is representing the prevailing party for no fee or for a fee which (taking into account all the facts and circumstances) is no more than a nominal fee. This subparagraph shall apply only if such award is paid to such individual or such individual's employer.

(4) Prevailing party.

(A) In general. The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)--

(i) which--

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of [section 2412\(d\)\(1\)\(B\) of title 28, United States Code](#) (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

(B) Exception if United States establishes that its position was substantially justified.

(i) General rule. A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceeding was substantially justified.

(ii) Presumption of no justification if Internal Revenue Service did not follow certain published guidance. For purposes of clause (i), the position of the United States shall be presumed not to be substantially justified if the Internal Revenue Service did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iii) Effect of losing on substantially similar issues. In determining for purposes of clause (i) whether the position of the United States was substantially justified, the court shall take into account whether the United States has lost in courts of appeal for other circuits on substantially similar issues.

(iv) Applicable published guidance. For purposes of clause (ii), the term "applicable published guidance" means--

(I) regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, and

(II) any of the following which are issued to the taxpayer: private letter rulings, technical advice memoranda, and determination letters.

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or--

(i) in the case where the final determination with respect to the tax, interest, or penalty is made at the administrative level, by the Internal Revenue Service, or

(ii) in the case where such final determination is made by a court, the court.

(D) Special rules for applying net worth requirement. In applying the requirements of [section 2412\(d\)\(2\)\(B\) of title 28, United States Code](#), for purposes of subparagraph (A)(ii) of this paragraph--

(i) the net worth limitation in clause (i) of such section shall apply to--

(I) an estate but shall be determined as of the date of the decedent's death, and

(II) a trust but shall be determined as of the last day of the taxable year involved in the proceeding, and

(ii) individuals filing a joint return shall be treated as separate individuals for purposes of clause (i) of such section.

(E) Special rules where judgment less than taxpayer's offer.

(i) In general. A party to a court proceeding meeting the requirements of subparagraph (A)(ii) shall be treated as the prevailing party if the liability of the taxpayer pursuant to the judgment in the proceeding (determined without regard to interest) is equal to or less than the liability of the taxpayer which would have been so determined if the United States had accepted a qualified offer of the party under subsection (g).

(ii) Exceptions. This subparagraph shall not apply to--

(I) any judgment issued pursuant to a settlement; or

(II) any proceeding in which the amount of tax liability is not in issue, including any declaratory judgment proceeding, any proceeding to enforce or quash any summons issued pursuant to this title, and

any action to restrain disclosure under section 6110(f) [26 U.S. C. § 6110(f)].

(iii) Special rules. If this subparagraph applies to any court proceeding--

(I) the determination under clause (i) shall be made by reference to the last qualified offer made with respect to the tax liability at issue in the proceeding; and

(II) reasonable administrative and litigation costs shall only include costs incurred on and after the date of such offer.

(iv) Coordination. This subparagraph shall not apply to a party which is a prevailing party under any other provision of this paragraph.

(5) Administrative proceedings. The term "administrative proceeding" means any procedure or other action before the Internal Revenue Service.

(6) Court proceedings. The term "court proceeding" means any civil action brought in a court of the United States (including the Tax Court and the United States Claims Court).

(7) Position of United States. The term "position of the United States" means--

(A) the position taken by the United States in a judicial proceeding to which subsection (a) applies, and

(B) the position taken in an administrative proceeding to which subsection (a) applies as of the earlier of--

(i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or

(ii) the date of the notice of deficiency.

(d) Special rules for payment of costs.

(1) Reasonable administrative costs. An award for reasonable administrative costs shall be payable out of funds appropriated under [section 1304 of title 31, United States Code](#).

(2) Reasonable litigation costs. An award for reasonable litigation costs shall be payable in the case of the Tax Court in the same manner as such an award by a district court.

(e) Multiple actions. For purposes of this section, in the case of --

(1) multiple actions which could have been joined or consolidated, or

(2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single court proceeding in the same court,

such actions or cases shall be treated as 1 court proceeding regardless of whether such joinder or consolidation actually occurs, unless the court in which such action is brought determines, in its discretion, that it would be inappropriate to treat such actions or cases as joined or consolidated.

(f) Right of appeal.

(1) Court proceedings. An order granting or denying (in whole or in part) an award for reasonable litigation or administrative costs under subsection (a) in a court proceeding, may be incorporated as a part of the decision or judgment in the court proceeding and shall be subject to appeal in the same manner as the decision or judgment.

(2) Administrative proceedings. A decision granting or denying (in whole or in part) an award for reasonable administrative costs under subsection (a) by the Internal Revenue Service shall be subject to the filing of a petition for review with the Tax Court under rules similar to the rules under section 7463 [26 U.S.C. § 7463] (without regard to the amount in dispute). If the Secretary sends by certified or registered mail a notice of such decision to the petitioner, no proceeding in the Tax Court may be initiated under this paragraph unless such petition is filed before the 91st day after the date of such mailing.

(3) Appeal of Tax Court decision. An order of the Tax Court disposing of a petition under paragraph (2) shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(g) Qualified offer. For purposes of subsection (c)(4)--

(1) In general. The term "qualified offer" means a written offer which--

(A) is made by the taxpayer to the United States during the qualified offer period;

(B) specifies the offered amount of the taxpayer's liability (determined without regard to interest);

(C) is designated at the time it is made as a qualified offer for purposes of this section; and

(D) remains open during the period beginning on the date it is made and ending on the earliest of the date the offer is rejected, the date the trial begins, or the 90th day after the date the offer is made.

The fact that the West Virginia Office of Tax Appeals Act does not contain a similar counterpart to this explicit and very detailed federal tax law provision on awarding certain costs and fees against the government in certain situations is very telling, especially in light of the immunity of state government in this state from liability for damages, under this state's constitution (not merely under the common-law principle of sovereign immunity), *see* W. Va. Const. art. VI, § 35 (effective Nov. 03, 1936). As stated in syllabus point 5 of *Graf v. W. Va. Univ.*, 189 W. Va. 214, 429 S.E.2d 496 (1992), *quoting* syl. pt. 1, *State ex rel. Bd. of Governors v. Sims*, 133 W. Va. 239, 55 S.E.2d 505 (1949), "'The power to authorize the expenditure of public funds is vested in the Legislature [subject to constitutional limitations], and, unless delegated by it under its legislative power, either in express terms [not here], or by **necessary** implication from powers so delegated [not here], it [may] not be exercised by any subordinate agency of the state government.'" (emphasis by bold print added)

To fall outside the state government's state constitutional immunity from damages, any recovery, before this limited-jurisdiction, executive-branch tribunal, against the State Tax Commissioner, of a taxpayer's incidental damages and reasonable attorney's fees, in a legislatively determined appropriate set of circumstances, would necessarily involve recovery against the state's liability insurance coverage, *see* W. Va. Code § 29-12-5, as last amended. *See* syl. pt. 2, *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983). A reasonable assessment of the risk under such liability insurance coverage would hinge upon an explicit and detailed provision like section 7430 of the Internal Revenue Code, rather than being based upon a

(2) Qualified offer period. For purposes of this subsection, the term "qualified offer period" means the period--

(A) beginning on the date on which the first letter of proposed deficiency which allows the taxpayer an

completely open-ended, *ad hoc* exercise of primarily “equitable” powers by this limited-jurisdiction, executive-branch tribunal.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. The conduct in this matter of the Commissioner’s investigative personnel indicates, frankly, insufficient training and experience, and was not reasonable, under the circumstances; on the other hand, this conduct was not in bad faith, vexatious, or wanton.

2. For the reasons set forth in the foregoing “Discussion,” the very general language of W. Va. Code § 11-10A-12 [2002] does not confer authority for the West Virginia Office of Tax Appeals, a limited-jurisdiction, executive-branch tribunal, to award incidental damages and reasonable attorney’s fees to a taxpayer who substantially prevails against the West Virginia State Tax Commissioner in litigation before this quasi-judicial administrative agency.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the request of the Petitioner to recover from the Respondent incidental damages of \$ and attorney’s fees (through November 18, 2005) of \$, totaling together \$, must be and is, therefore, hereby **DENIED**.